No. 88-1759

MAY 31 1989

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA,
Petitioner

v.

MARVIN MANDEL, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED BY THE PETITIONER

Whether [respondents] are entitled to writs of error coram nobis vacating their 1977 mail fraud convictions, even though the indictment states an offense and the evidence presented at trial supports their convictions, because the jury instructions were erroneous under *McNally v. United States*, 483 U.S. 350 (1987).

PARTIES TO THE PROCEEDING

In addition to the named parties, W. Dale Hess, Harry W. Rodgers, III, William A. Rodgers, Irvin Kovens, and Ernest N. Cory are respondents.

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BRIEF IN OPPOSITION

The respondents respectfully pray that this Court deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-26a) is reported at 862 F.2d 1067. The opinion of the District Court (Pet. App. 27a-57a) is reported at 672 F. Supp. 864.

JURISDICTION

The petition for writ of certiorari was filed with the Clerk on April 28, 1989. The judgment of the Court of Appeals was entered on December 7, 1988. Obviously, the petition must be deemed untimely (Rule 20.1) unless the time for its filing was tolled by compliance with Rule 20.4.

When a petition for rehearing is "timely filed" in the Court of Appeals, Rule 20.4 provides that the time for filing the petition for writ of certiorari runs from the date of the denial of rehearing. In this case, the time for filing a petition for rehearing (as extended by the Court of Appeals) expired on January 20, 1989. The petition for rehearing was received on January 24, 1989, followed by the petitioner's motion to file its petition out of time. On February 3, 1989, the Court by order denied the petitioner's motion to file its untimely petition (Pet. App. at 58a). On March 1, 1989, ruling on the petitioner's motion to reconsider, the Court granted permission for the petitioner "to file its petition for rehearing out of time" and simultaneously denied the petition (Pet. App. at 59a).[1]

STATEMENT OF THE CASE

Respondent Marvin Mandel was Governor of Maryland from 1969 to 1979. The remaining respondents are Maryland citizens. Respondents were convicted in Au-

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[1] The requirement of Rule 20.4 that a petition for rehearing must be "timely filed" is not satisfied by filing such a petition out of time. An untimely petition for rehearing has no tolling effect. Cf., *Browder v. Director*, 434 U.S. 257, 267 (1978) (involving "timely motion" provision of Rule 4(a)(4), Federal Rules of Appellate Procedure). When it allowed the petition for rehearing to be filed out of time, the Court of Appeals accommodated the government's stated desire to petition for a writ of certiorari. However, as this Court has recognized, "the time within which a losing party must seek review cannot be enlarged just because the lower court in its discretion thinks it should be enlarged." *Federal Trade Comm'n v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211 (1952).

gust, 1977, after a jury trial, of mail fraud and racketeering charges under 18 U.S.C. §§ 1341 and 1961 *et seq.*, respectively.[2] Nearly a decade after the Mandel trial, this Court, in *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875 (1987), held that § 1341 does not make criminal schemes designed to deprive the people of non-property rights such as the right to have public officials perform their duties honestly. After this Court's decision in *McNally*, the respondents filed petitions for writs of error coram nobis to vacate the judgments of convictions entered against them. The United States District Court for the District of Maryland granted the writs, and vacated all of the respondents' convictions (Pet. App. 27a-57a). The United States Court of Appeals for the Fourth Circuit affirmed. *Id.* at 1a-26a.

1. The indictment charged the respondents with participating in an alleged scheme to cause Mandel to support legislation that would be beneficial to Marlboro Race Track, which the remaining respondents either had an interest in or owned. The indictment, in essence, charged that as a result of the alleged scheme the citizens of the State of Maryland had been deprived of their intangible right to Mandel's honest and faithful services (Pet. App. at 2a-3a). Prior to trial, the respondents moved to dismiss the indictment on the basis that the indictment "fails to allege a cognizable scheme to defraud . . . ," *United States v. Mandel*, 415 F. Supp. 997, 1003 (D. Md. 1976) because "the intangible rights allegedly defrauded by the scheme do not constitute 'something of value' whose deprivation can be punished under the mail fraud statute." *Id.* at 1005-1006. The District Court denied the Motion to Dismiss, and the case proceeded to trial on June 1, 1977.

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[2] Mandel was sentenced to a four-year prison term; Kovens and Harry Rodgers each received a four-year sentence and a $40,000 fine; Williams Rodgers was sentenced to twenty months and fined $40,000; and Cory received an eighteen-month sentence. By 1982, all of the respondents had completed their sentences.

2. After lengthy proceedings, the jury was charged on August 9, 1977. The "intangible rights" theory, which had been the essence of the government's case, was featured in the charge (Pet. App. at 4a-5a and 36a). Contrary to the respondents' requests, the jury was not instructed that, in order to prove mail fraud, the government had to demonstrate that the State of Maryland or its citizens suffered any loss of money or property (Pet. App. at 5a and 36a-37a). After deliberating for 13 days and being commanded in the midst of their deliberations via an *Allen* charge, the jury returned the verdicts on which the judgments of conviction were entered.

3. On appeal, the respondents challenged the "intangible rights" construction of the mail fraud statute.[3] The Court of Appeals rejected respondents' contention, but vacated the convictions on other grounds. *United States v. Mandel*, 591 F.2d 1347 (4th Cir. 1977).

4. After rehearing en banc, the judgments of conviction were affirmed by an equally divided court. The Court of Appeals stated that "[a] majority of the members of the en banc court would affirm the judgments of conviction against all of the contentions of the appellants except the claim of error in the charge to the jury which was the point upon which there was equal division." *United States v. Mandel*, 602 F.2d 653 (4th Cir. 1979). Thereafter, the respondents requested a further rehearing en banc to cure the problems created by the tie vote,

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[3] The Court of Appeals for the Fourth Circuit expressly stated that:

> Appellants' alleged scheme to defraud falls within [the] second category [announced in *United States v. McNeive*, 536 F.2d 1245, 1248-49 (8th Cir. 1976)] in that they are charged with devising a scheme and artifice to defraud the citizens of the State of Maryland and its governmental departments, agencies, officials, and employees of the right to conscientious, loyal, faithful, disinterested and honest government, i.e., intangible rights and interest.

United States v. Mandel, 591 F.2d 1347, 1361 n.10 (4th Cir. 1979).

but that request was denied by a 4-4 tie vote. *United States v. Mandel*, 609 F.2d 1076 (4th Cir. 1979) (en banc).

5. Respondents filed a petition for a writ of certiorari with this Court. One issue presented in the petition was whether the federal mail fraud statute, 18 U.S.C. § 1341, as construed and applied in this case, had been extended impermissibly to allow a jury to find the respondents guilty of participating in an alleged scheme to deprive the citizens, the officials, and the General Assembly of the State of Maryland of the loyal and faithful services of its Governor. Respondents' petition was denied. 445 U.S. 961 (1980).

6. In *McNally*, this Court held that that § 1341 does not make criminal schemes designed to deprive the people of "intangible rights" such as the right to have public officials perform their duties honestly. The Court observed that the lower federal court's affirmance of the convictions had been based on "a line of decisions . . . holding that the mail fraud statute proscribe schemes to defraud citizens of their intangible rights to honest and impartial government." *McNally v. United States*, *supra*, 483 U.S. at 355, 107 S.Ct. at 2879, *citing United States v. Mandel*, 591 F.2d 1347 (4th Cir. 1979), aff'd in relevant part, 602 F.2d 653 (en banc), *cert. denied*, 445 U.S. 961 (1980). In *McNally*, the Court declared that such schemes were beyond the scope of the mail fraud statute and that a conviction was invalid if "the jury was not required to find that the Commonwealth itself was defrauded of any money or property." *Id.* at 360, 107 S.Ct. at 2882.[4] Thereafter, respondents sought writs

[4] The *McNally* jury charge required no such finding, and therefore "permitted a conviction for conduct not within the reach of 1341." *Id.* Accordingly, the Court in *McNally* reversed the Court of Appeals' ruling, and in so doing, held that the federal mail fraud statute, 18 U.S.C. § 1341, protects only rights in money and property, not intangibles such as the right of the citizenry to good government.

of error coram nobis from the United States District Court for the District of Maryland. Because the jury was instructed that it could convict for acts that did not amount to a federal crime, the District Court granted the writs of error coram nobis and set aside the convictions and adjudications of guilt of respondents (Pet. App. 27a-57a). From the District Court's order, the government took its appeal.

7. The Court of Appeals affirmed. The court announced that "this case is indistinguishable from *McNally*, and thus, the petitioners here were convicted for conduct we now know is 'not within the reach of § 1341.'" *citing McNally v. United States*, *supra*, 483 U.S. at ——, 107 S.Ct. at 2882-84 (Pet. App. at 10a). The Court of Appeals further held that coram nobis relief is appropriate in this case "in order to achieve justice" (Pet. App. 15a).[5] In affirming, the Court of Appeals expressly held that "as in *McNally*, a conviction here was permitted without a finding that the State was defrauded of money or property, only of the 'conscientious, loyal, faithful, disinterested and unbiased services' of Marvin Mandel, in the very words of the indictment, substantially repeated in the jury charge" (Pet. App. at 11a).

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[5] The Court of Appeals followed the Second Circuit, which, in an opinion by Judge Friendly, vacated mail fraud convictions on a writ of error coram nobis. *United States v. Travers*, 514 F.2d 1171 (2d Cir. 1974).

ARGUMENT

The petitioner contends that the question presented in this case is "[w]hether [respondents] are entitled to writs of error coram nobis vacating their 1977 mail fraud convictions, even though the indictment states an offense and the evidence presented at trial supports their convictions, because the jury instructions were erroneous under *McNally v. United States*, 483 U.S. 350 (1987)." Indeed, the petitioner submits in this case the identical "question presented" in *Keane v. United States*, —— U.S. —— (No. 88-1178, this Term), in which the government urged this Court to grant the petition for a writ of certiorari. *Compare* Brief for the United States in *Keane v. United States*, *supra*, at 12. In its petition in the instant case, the petitioner depicts *Keane* as "a more appropriate candidate for plenary review than this case." Petition at 6. The government submits that its petition should be "disposed of as appropriate in light of the Court's disposition of *Keane v. United States*, No. 88-1178." Petition at 7.

On May 22, 1989, this Court denied the petition for a writ of certiorari in *Keane*. Consistent with the petitioner's own views, its petition should be denied in the light of this Court's disposition of *Keane*. The denial of the petition for a writ of certiorari in *Keane* does not make this case any more reviewable.

Furthermore, there is far less reason to grant plenary review of this case than was presented in *Keane*. Confronted by this Court's repudiation of the expansive construction of the mail fraud statute under which the respondents were indicted, prosecuted and convicted, the petitioner argues that the evidence presented at trial was sufficient to support the convictions. This argument is totally without merit. Unlike *Keane*, in this case the government failed to present any evidence that would suffice under *McNally v. United States*. There was no

evidence whatsoever in this case of any alleged scheme to deprive the State of Maryland, as a property holder, of its money or property.[6] Apart from erroneous jury instructions which permitted a conviction for conduct beyond the reach of the mail fraud statute, there was not a shred of evidence presented in this case that would pass muster under *Keane*, much less *McNally*.

In the wake of *McNally*, petitioner argued below that the "money or property" requirement of *McNally* had been satisfied by the evidence at trial in two respects. First, although no such theory was presented at trial, the petitioner contended that the State of Maryland was deprived of the value of the alleged "bribes" paid to Mandel and held by him in constructive trust for the State. Second, petitioner argued below that the State's allocation of racing days, like a license, was a property interest over which the State was deprived of control.

Neither of these proffered theories, as we continue to submit, has any validity. Even before *McNally* was decided, the government's constructive trust" theory of mail fraud prosecution was rejected explicitly.[7] In the face of those precedents, the government did not prosecute the respondents under the "constructive trust" theory and the jury was not instructed to find in accordance with that theory.

The decision below aligned itself with the uniform post-*McNally* rejection of the "constructive trust" theory pre-

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[6] As the District Court observed below, the government prosecutors "put all their mail fraud eggs in the 'good government' basket" (Pet. App. at 55a n.11). The Court of Appeals noted that, at trial, "the court, at the government's urging, specifically rejected an instruction offered by [respondents] requiring for conviction a finding that the State was defrauded of some money or property interest" (Pet. App. at 14a).

[7] *See e.g., United States v. Feldman*, 711 F.2d 758, 763-64 (7th Cir.), *cert. denied*, 464 U.S. 939 (1983); *United States v. McNeive*, 536 F.2d 1245, 1251 n.12 (8th Cir. 1976).

sented in *United States v. Runnels*, 833 F.2d 1183 (6th Cir. 1987), *vacated on rehearing*, 842 F.2d 909, 912 (6th Cir. 1988)[8] by recent decisions. *See United States v. Goodrich*, No. 88-3491 (April 22, 1989), —— F.2d —— (11th Cir. 1989); *United States v. Slay*, 858 F.2d 1310, 1316 n.4 (8th Cir. 1988) (rehearing en banc denied Nov. 10, 1988); *United States v. Zauber*, 857 F.2d 137, 146 (3rd Cir. 1988), *cert. denied*, 109 S.Ct. 1340 (1989); *United States v. Shelton*, 848 F.2d 1485, 1491-92 (10th Cir. 1988) (en banc); *United States v. Ochs*, 842 F.2d 515, 523-27 (1st Cir. 1988); *United States v. Holzer*, 840 F.2d 1343, 1346-48 (7th Cir.), *cert. denied*, 108 S.Ct. 2022 (1988). These cases hold that the discredited "constructive trust" theory is insufficient as a matter of law to salvage a pre-*McNally* conviction based upon predicate acts of bribery.

The only other claim below that the evidence would suffice under *McNally* rests on an equally untenable theory, i.e., that racing days constitute property. The government utterly failed to introduce evidence that the allocation of racing days deprived the state of money or property. Indeed, the petitioner admits that "[d]oubling the number of racing days at the track substantially increased its revenues . . . [and that] the State Racing Commission allowed Marlboro to run its races on a mile track, rather than on a half-mile track, which further increased its revenues" (Petition at 7). Further, the decisions are uniform in rejecting the government's theory that the right to control or license the transfer of property is sufficient to meet the "money or property" requirement of *McNally*. *See e.g., United States v. Goodrich, supra* (claim that city was deprived of control over zoning decisions); *United States v. Zauber, supra*, 857

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[8] In fact, the Sixth Circuit expressly vacated the *Runnels* opinions when it granted rehearing *in banc*. *United States v. Runnels*, 842 F.2d 909, 912 (6th Cir. 1988).

F.2d at 146-147 (3rd Cir. 1988) (claim that pension fund was deprived of control of its invested monies); *United States v. Dadanian*, 856 F.2d 1391, 1392 (9th Cir. 1988) (claim that city was deprived of its right to control issuance of registration certificate and bingo license); *United States v. Gimbel*, 830 F.2d 621, 626-27 (7th Cir. 1987) (claim that U.S. Treasury officials were deprived of information needed to collect revenues). The Court of Appeals, as it did with the "constructive trust" theory, held that the government's racing days as a property theory was also "not at issue in this case because the jury was not instructed [on this theory]" (Pet. App. at 13a).

There is no basis for attaching significance, as the petitioner does, to the fact that the Fourth Circuit Court of Appeals "did not address either of the Seventh Circuit [in *Keane*'s] alternative theories, which are (1) that an issue cannot be raised pursuant to coram nobis when the issue was fully litigated on direct appeal and (2) that a petitioner who suffers no current civil disability as a result of his conviction may not obtain coram nobis relief" (Pet. App. at 6-7). Neither theory was raised by the government in either of the courts below and should not now be entertained by this Court. In short, none of the considerations set forth by Supreme Court Rule 17.1 governing review on certiorari is even remotely met.

This Court need not grant certiorari for a number of reasons. First, this case was correctly decided below. Second, because the petition for rehearing was not "timely filed" below, the petition for a writ of certiorari is likewise untimely. *See* discussion *supra* at 2. Third, Congress has recently amended the mail fraud statute to provide that a " 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat.

4508.[9] Because of the change in the statute, the legal issues here at stake are unlikely to recur.

Finally, in sole reliance upon *United States v. Keane*, 852 F.2d 199 (7th Cir. 1988), *cert. denied*, —— U.S. —— (No. 88-1178, This Term, 1988, May 22, 1989), the petitioner argues that the settled principles of collateral attack are inapplicable to coram nobis proceedings. The writ of coram nobis is an extraordinary form of relief which should be granted "only under circumstances compelling such action to achieve justice" and to correct errors "of the most fundamental character." *United States v. Morgan*, 346 U.S. 502, 511-12 (1954). That standard, as applied by the panel majority (Pet. App. at 16a), is "substantially equivalent" to federal habeas corpus requirements. *United States v. Little*, 608 F.2d 296, 299 (8th Cir. 1979), *cert. denied*, 444 U.S. 1089 (1980); *United States v. McCord*, 509 F.2d 334, 340 n.6 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 930 (1975) ("co-terminous").[10] Accordingly, § 2255 precedents are relevant because "the standards applied in federal coram nobis are similar. *United States v. Travers*, *supra*, 514 F.2d at 1173 n.1 (2d Cir. 1974).

In essence, the law of coram nobis has not changed. Whether coram nobis relief is appropriate depends on the facts and circumstances of each particular case, i.e., the indictment, the evidence presented at trial, and the jury instructions. In cases involving collateral attacks,

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[9] As the petitioner observes, "[t]he legislative history of the new provision explains that '[t]his section overturns the decision in *McNally v. United States*.'" 134 Cong. Rec. S17,376 (daily ed. Nov. 10, 1988) (Pet. Brief at 4 n.2).

[10] Under 28 U.S.C. § 2255, relief is not available "unless the claimed error constitutes 'a fundamental defect which inherently results in a complete miscarriage of justice.'" *United States v. Addonizio*, 442 U.S. 178, 186 (1979). *See Davis v. United States*, 417 U.S. 333, 346 (1974).

the reviewing court invariably examines the instructions to determine whether the defendant has been prejudiced by an improper jury instruction. This quasi-factual determination is not appropriate for this Court.

It is undisputed that pre-*McNally* convictions have been reversed on direct appeal when the instructions present multiple theories and the reviewing court was in doubt whether the jury relied upon an intangible rights theory to find guilt. *See e.g., United States v. Slay*, 858 F.2d 1310, 1314-15 (8th Cir. 1988); *United States v. Conover*, 845 F.2d 266, 271 (11th Cir. 1988); *United States v. Ochs*, 842 F.2d 515, 520, 524-25 (1st Cir. 1988); *United States v. Huls*, 841 F.2d 109, 112 (5th Cir. 1988).

The identical principle applies to collateral review of a conviction. The rule of *McNally* is not confined to convictions pending on direct appeal but is to be applied retroactively in a collateral attack on prior convictions grounded upon intangible rights theories. *See e.g., Allen v. United States*, 867 F.2d 969, 971-72 (6th Cir. 1989) (coram nobis); *United States v. Osser*, 864 F.2d 1056, 1059-61 (3rd Cir. 1988) (coram nobis); *Magnuson v. United States*, 861 F.2d 166, 167 (7th Cir. 1988) (§ 2255); *United States v. Shelton*, 848 F.2d 1485, 1490 (10th Cir. 1988) (en banc) (§ 2255); *Ingber v. Enzor*, 841 F.2d 450, 453-54 (2d Cir. 1988) (§ 2255).

When the conviction is reviewed on habeas corpus, the rule "is that a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of the grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground." *Zant v. Stephens*, 462 U.S. 862, 881 (1983) (habeas corpus). The rule applies to a general verdict if the record has "left the reviewing Court uncertain as to the actual ground on

which the jury's decision rested." *Id.* *See Francis v. Franklin*, 471 U.S. 307, 322-24 (1985).

In the wake of *McNally*, the same principle has been invoked to invalidate mail fraud convictions on collateral attacks where the reviewing court was uncertain whether the jury relied upon intangible rights instructions to find guilt. *See e.g., Magnuson v. United States*, 861 F.2d 166, 168 (7th Cir. 1988) (§ 2255); *Ingber v. Enzor*, 841 F.2d 450, 456 (2d Cir. 1988) (§ 2255); *Allen v. United States*, 867 F.2d 969, 971-72 (6th Cir. 1989) (coram nobis).[11]

An examination of the record in this case confirms that the District Court and the Court of Appeals acted in confirmity with the principles articulated above. Neither court "so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by a lower court, as to call for an exercise of the court's power of supervision" (Rule 17.1).

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[11] Conversely, the convictions have been sustained when there is no such uncertainty. *See e.g., Lombardo v. United States*, 865 F.2d 155, 159 (7th Cir. 1989) (§ 2255) ("jury instructions did not allow conviction based on the intangible rights theory alone nor as an alternative to the money or property requirement"); *United States v. Osser*, 864 F.2d 1056, 1063 (3rd Cir. 1988) (coram nobis) ("the jury could not escape finding financial loss as part of the scheme"); *United States v. Bonansinga*, 855 F.2d 476, 480 (7th Cir. 1988) (coram nobis) ("we are satisfied beyond a reasonable doubt" that Bonansinga was convicted of conduct which is in derogation of the mail fraud statute).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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